

FILED BY *AG* D.C.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION AT MEMPHIS

FILED BY *AG* D.C.

2005 OCT 11 PM 1: 15

THOMAS M. GOULD
CLERK, U.S. DISTRICT COURT
WD OF TENNESSEE
SHELLA UPSHAW,

THOMAS M. GOULD
CLERK, U.S. DISTRICT COURT
WD OF TENNESSEE

Plaintiff,

vs.

AMERICAN INTERNATIONAL
GROUP, INC; et al.,

Defendants.

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* CIVILCASE NO. 2:05-cv-02653-JPM-dky

MOTION GRANTED

Jon Phipps McCalla
JON PHIPPS McCALLA
U.S. DISTRICT JUDGE

Oct. 20, 2005
DATE

PLAINTIFF'S MOTION TO STAY DEFENDANTS'
MOTION TO DISMISS

Comes now Plaintiff, by and through counsel, and respectfully request that this Honorable Court enter an order staying consideration of Defendants American International Group, Inc. ("AIG") and American General Corporation's ("AGC") Motion to Dismiss, pending a decision on Plaintiff's Motion to Remand. In support of which Plaintiff would show the following:

On or about August 11, 2005, Plaintiff filed this action in the Circuit Court of Shelby County, Tennessee. On or about September 9, 2005, Defendants filed a Notice of Removal based on fraudulent joinder. Consequently, the Removal is improperly based on diversity of citizenship. On or about September 16, 2005, Defendants AIG and AGC filed a Motion to Dismiss contending this Court lacks personal jurisdiction over these Defendants. On or about October 11, 2005, Plaintiff filed a Motion to Remand and Brief in Support of Motion to Remand. In the interest of justice, the Plaintiff's motion for a stay on further proceedings pending the

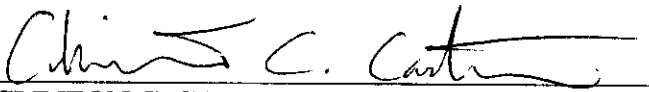
outcome of Plaintiff's Motion to Remand is due to be granted given that the Court would not have subject matter jurisdiction over these matters if the Plaintiff's Motion to Remand is granted.

In Godsey v. Miller, 9 Fed.Appx. 380, 384 (6th Cir. 2001), stated that "it is a well settled principle that 'the district court must be certain that federal subject matter jurisdiction is proper before entertaining a motion by the defendant under Federal Rule 12 to dismiss the plaintiff's complaint for failure to state a claim upon which relief may be granted.'" (citing 14C CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3739, at 423 (3d ed. 1998)). In it's decision, the Godsey court went on to add that, "the preferred method is to determine whether the action has been properly removed and the court has jurisdiction before disposing of other pending motions." Id. at 384-385. See also Austin v. American General Finance, 900 F.Supp. 396, 398 (M.D. Ala. 1995)(stating 28 U.S.C. § 1447(c) states that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case **shall** be remanded." (emphasis added). Based on the word "shall" in § 1447(c), the Court should first address Plaintiff's motion to remand and if the Court has subject matter jurisdiction then the motion to dismiss should be considered). Plaintiff has challenged, on solid grounds, the Defendants' removal of this action from the Circuit Court of Shelby County, Tennessee, to this Court, in the Plaintiff's Brief in Support of Remand. Granting a stay on this issue will not prejudice either party.

If Plaintiff's Motion to Remand is granted, this Court would not **ever** have had subject matter jurisdiction over the matters currently before it. If the Court were to entertain any motions filed by Defendants, and then found that it did not have jurisdiction, and properly granted Plaintiff's Motion to Remand, all of the rulings by this Court would be null and void. Therefore, in the interest

of judicial economy, Plaintiff asks this Court to issue a stay on any further proceeding concerning the Defendants' Motion to Dismiss pending the outcome of the Plaintiff's Motion to Remand.

Based on the foregoing, Plaintiff's Motion for a Stay is due to be granted.

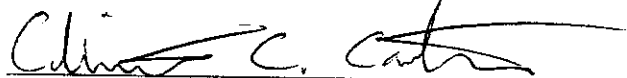

CLINTON C. CARTER (TNB# 17990)
Attorney for Plaintiffs

OF COUNSEL:

**BEASLEY, ALLEN, CROW,
METHVIN, PORTIS & MILES, P.C.**
Attorneys at Law
Post Office Box 4160
Montgomery, AL 36103-4160
(334) 269-2343
(334) 954-7555 (fax)

CERTIFICATE OF SERVICE

I hereby certify that I have filed the original of the foregoing document in this Court with copies to be served upon all Counsel of record as listed below by placing a copy of same in the United States Mail, first class, postage prepaid on this the 10 day of October, 2005.


OF COUNSEL

**Attorney for Defendants American International Group, Inc. and
American General Corporation;**

T. Louis Coppedge
MAYNARD COOPER & GALE
1901 Sixth Ave., N.
Ste. 2400
Birmingham, AL 35203-2602
205-254-1000
Fax: 205-254-1999
Email: lcoppedge@mcglaw.com

**Attorneys for Defendants American General Finance, Inc.;
American General Financial Services, Inc.;
Merit Life Insurance Company; Yosemite Insurance Company
and Lisa Seawright;**

Daniel Warren Van Horn
Frank M. Holbrook
BUTLER SNOW O'MARA STEVENS & CANADA, PLLC- Memphis
6075 Poplar Ave.
Ste. 500
Memphis, TN 38119
901-680-7331
Email: danny.vanhorn@butlersnow.com

Patrick Ryan Beckett
BUTTER SNOW O'MARA STEVENS & CANNADA, PLLC
P.O. Box 22567
Jackson, MS 39225-2567
601-948-5711



Notice of Distribution

This notice confirms a copy of the document docketed as number 13 in case 2:05-CV-02653 was distributed by fax, mail, or direct printing on October 21, 2005 to the parties listed.

Jimmy Moore
CIRCUIT COURT, 30TH JUDICIAL DISTRICT
140 Adams Ave.
Rm. 224
Memphis, TN 38103

Daniel Warren Van Horn
BUTLER SNOW O'MARA STEVENS & CANADA, PLLC- Memphis
6075 Poplar Ave.
Ste. 500
Memphis, TN 38119

Frank M. Holbrook
BUTLER SNOW O'MARA STEVENS & CANADA, PLLC
6075 Poplar Ave.
Ste. 500
Memphis, TN 38119

T. Louis Coppedge
MAYNARD COOPER & GALE
1901 Sixth Ave., N.
Ste. 2400
Birmingham, AL 35203--260

Clinton C. Carter
BEASLEY ALLEN CROW METHVIN PORTIS & MILES, PC
272 Commerce St.
P.O. Box 4160
Montgomery, AL 36103--416

Patrick Ryan Beckett
BUTTER SNOW O'MARA STEVENS & CANNADA, PLLC
P.O. Box 22567
Jackson, MS 39225--256

Honorable Jon McCalla
US DISTRICT COURT